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**ADMINISTRATIVE REVIEW**

In the matter of the Virginia Department of Transportation  
Ruling Number 2020-4984  
September 20, 2019

The grievant has requested that the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”)<sup>1</sup> administratively review the hearing officer’s reconsideration decision in Case Number 11352. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The substantive and procedural facts of this case are set forth in EDR’s first administrative review in this matter, EDR Ruling Number 2020-4968, and are incorporated herein by reference.<sup>2</sup> This case concerns the grievant’s receipt of a Group III Written Notice with a five-workday suspension.<sup>3</sup> In the original hearing decision, the hearing officer concluded that the agency had presented sufficient evidence to demonstrate that the grievant engaged in the conduct charged on the Written Notice and that the grievant’s behavior constituted misconduct at the level of a Group III offense.<sup>4</sup> However, the hearing officer further determined that the five-workday suspension was improper because it resulted in a temporary termination of the grievant’s health benefits. He rescinded the suspension and ordered the agency to provide back pay and back benefits.<sup>5</sup>

The agency requested administrative review of the original hearing decision, challenging the hearing officer’s rescission of the five-workday suspension. In EDR Ruling Number 2020-4968, this Office found that the suspension was consistent with DHRM Policy 1.60, *Standards of*

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<sup>1</sup> The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

<sup>2</sup> See also Decision of Hearing Officer, Case No. 11351 (“Hearing Decision”), July 22, 2019; Reconsideration Decision of Hearing Officer, Case No. 11351 (“Reconsideration Decision”), Aug. 22, 2019.

<sup>3</sup> Hearing Decision at 1.

<sup>4</sup> *Id.* at 4. The facts underlying the misconduct charged on the Written Notice have not been disputed by the parties, either in the agency’s request for administrative review of the original hearing decision or the grievant’s appeal of the reconsideration decision.

<sup>5</sup> Hearing Decision at 6.

*Conduct*, and that the agency’s termination of the grievant’s health benefits was not a basis to rescind the suspension.<sup>6</sup> EDR further determined that, while the “grievant’s health benefits should not have been suspended” and “[t]he grievant [was] rightly entitled to have any denied benefits restored, . . . the agency had already taken steps to restore those benefits” at the time of the hearing, and “[t]hus, the hearing officer’s findings regarding the impact and appropriate remedy on this issue [were] not supported by the record or the grievance procedure.”<sup>7</sup> Accordingly, EDR concluded that “any relief the hearing officer could award in this instance had already been directed by the agency before the hearing took place,”<sup>8</sup> and remanded the case to the hearing officer, directing that the five-workday suspension be upheld.<sup>9</sup> On August 22, 2019, the hearing officer issued a reconsideration decision upholding the five-workday suspension.<sup>10</sup> The grievant has now appealed the reconsideration decision to EDR.

### DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure . . . .”<sup>11</sup> If the hearing officer’s exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.<sup>12</sup> The Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.<sup>13</sup> The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In his request for administrative review, the grievant argues that the agency’s action was inconsistent with policy and/or law, and further contends that EDR erred in concluding there was no remedy available to address the agency’s improper termination of his health benefits.<sup>14</sup> The grievant is correct that, by terminating his health benefits in conjunction with the five-workday suspension, the agency did not comply with applicable policy and law.<sup>15</sup> The evidence in the record is clear, however, that the agency corrected the error when it was notified of the issue by the grievant, confirmed that there was no lapse in the grievant’s coverage retroactively, and

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<sup>6</sup> EDR Ruling Number 2020-4968 at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.* at 3.

<sup>10</sup> Reconsideration Decision at 1.

<sup>11</sup> Va. Code §§ 2.2-1202.1(2), (3), (5).

<sup>12</sup> *See Grievance Procedure Manual* § 6.4(3).

<sup>13</sup> Va. Code §§ 2.2-1201(13), 2.2-3006(A); *see Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

<sup>14</sup> The grievant also appears to argue that the five-workday suspension should be rescinded “due to mitigating circumstances,” without identifying any basis for a claim that the hearing officer’s mitigation analysis was flawed. Grievant’s Request for Administrative Review at 2-3. The hearing officer did not rescind the five-workday suspension in his original decision based on mitigating factors, but rather due to his conclusion that the suspension was inconsistent with policy and law. Hearing Decision at 5. As discussed above, this aspect of the hearing officer’s analysis was in error. Accordingly, EDR has no basis to conclude that the mitigating factors supported rescission of the suspension in this case. *See Rules for Conducting Grievance Hearings* §§ VI(A), VI(B)(1), VI(B)(2).

<sup>15</sup> 1 VAC § 55-20-410(A); DHRM Policy 1.60, *Standards of Conduct*, § D(2)(d).

informed the grievant that he should be able to access his health benefits within 24 hours.<sup>16</sup> Applicable regulatory guidance provides that DHRM “shall hold the employee harmless for any [health benefits] errors made by . . . state agencies,” and that the “[t]he cost of any such errors . . . shall be borne by the . . . state agency, and not the employee.”<sup>17</sup> There is no evidence in the record to show that the grievant suffered financial harm as a result of the brief termination of his health benefits.<sup>18</sup> Furthermore, as noted in EDR’s first administrative review, “there is no remedy available under the grievance procedure in this situation other than retroactively restoring the benefits,” which has already occurred, and “[t]o the extent the grievant experienced intangible harm, it is not remediable under the circumstances presented in this case.”<sup>19</sup> In the absence of evidence showing tangible harm to the grievant as a result of the agency’s error, EDR has no basis to conclude that rescission of the five-workday suspension, or any other remedy, is warranted under the circumstances presented here.

For these reasons, EDR concludes that the hearing officer’s reconsideration decision upholding the agency’s issuance of the Group III Written Notice and the five-workday suspension is consistent with state policy and the grievance procedure.<sup>20</sup> Accordingly, EDR will not further disturb the hearing officer’s decision.

#### CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer’s reconsideration decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>21</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>22</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>23</sup>



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<sup>16</sup> Grievant’s Ex. 9; Hearing Decision at 3.

<sup>17</sup> 1 VAC § 55-20-310. DHRM has been given the authority to establish and administer a health benefits program for state employees. Va. Code § 2.2-2818; 1 VAC § 55-20-30.

<sup>18</sup> EDR Ruling No. 2020-4968 at 3-4; Hearing Decision at 3-4, 5.

<sup>19</sup> EDR Ruling No. 2020-4968 at 4.

<sup>20</sup> Reconsideration Decision at 1. To the extent the grievant argues that the reconsideration decision is contradictory to law, this claim must be addressed in an appeal to the circuit court in which the grievance arose rather than EDR. *See* Va. Code § 2.2-3006(B).

<sup>21</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>22</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>23</sup> *Id.*; *see also* Va. Dep’t of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).